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No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

STATE OF NEBRASKA, Plaintiff
v.
STATE OF WYOMING, Defendant

BRIEF OF AMICUS CURIAE NATIONAL AUDUBON SOCIETY IN SUPPORT OF NEBRASKA'S MOTION FOR LEAVE TO FILE AN AMENDED PETITION FOR APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND ASSERTION OF NEW CLAIMS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF INTEREST 2

ARGUMENT. 4

I. PLATTE RIVER ECOSYSTEM IS A UNIQUE SYSTEM OF NATIONAL AND INTERNATIONAL IMPORTANCE THAT IS DEPENDENT ON IRRIGATION SEASON AND NON- IRRIGATION SEASON FLOWS. 4

II. THE PLATTE RIVER HAS BEEN DEGRADED BY DIMINUTION IN FLOWS AND WILL DEGRADE FURTHER IF WYOMING DEPLETES NATURAL AND RETURN FLOWS DURING THE NON-IRRIGATION SEASON 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES	Page
Nebraska v. Wyoming, 325 U.S. 589 (1945).	1
Wyoming v. Colorado, 259 U.S. 466 (1922).	9
STATUTES AND REGULATIONS	
Endangered Species Act, 16 U.S.C. § 1531, et seq. .	7
50 C.F.R. § 17.95 (1991)	6
OTHER	
P. Currier, G. Lingle and J. VanDerwalker, Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska, Platte River Whooping Crane Maintenance Trust (1985)	7
C. Safina, L. Rosenbluth, C. Pustweller, K. Strom, R. Klataske, M. Lee, and J. Beyea, Threats to Wildlife and the Platte River. National Audubon Society Report (1989)	7
USFWS, "The Platte River Ecology Study," Special Report, Northern Prairie Research Center (1981)	6
J.S. O'Brien and P. Currier, "Channel Morphology and Riparian Vegetation Changes in the Big Bend Reach of the Platte in Nebraska." Final Draft Report, Platte River Whooping Crane Maintenance Trust (1987).	8

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STATEMENT OF THE CASE

This is a proceeding in original jurisdiction involving enforcement of the 1945 Supreme Court Decree that apportioned the natural flow of the North Platte River among Nebraska, Wyoming and Colorado.[1] Nebraska initiated this action in 1986 when she petitioned the Court to enforce the 1945 Decree and for injunctive relief against Wyoming. The Court granted Nebraska's petition in January 1987, and referred the matter to Special Master Owen Olpin by order dated June 22, 1987.

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[1] Nebraska v. Wyoming, 325 U.S. 589 (1945).

The National Audubon Society ("Audubon") has participated in this proceeding as litigating amicus curiae since 1988.[2] Audubon's role has been to represent the interests of its members in several hundred species of migratory birds that depend on certain stretches of the Platte River in Nebraska downstream from the Tri-State Dam. As amicus curiae, Audubon has been active by filing briefs, participating in hearings, and taking part in telephone conferences with the parties and other amici.

On October 9, 1991 Nebraska filed her Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims. Audubon submits this brief in support of Nebraska's Motion, and urges the Supreme Court to grant Nebraska leave to amend her original petition in this case. The species of concern in this proceeding are dependent on the Platte River habitat, the viability of which in turn depends upon the river's flow regime year-round.

STATEMENT OF INTEREST

Audubon has a compelling interest in the outcome of this proceeding. Audubon is a nonprofit, national conservation organization with more than 550,000 members, many of whom are affiliated with one of Audubon's 500 local chapters. Audubon is dedicated to the preservation of birds and other wildlife and their habitat. Over 3,000 Audubon members reside currently in Nebraska, and five local chapters are in Nebraska.

Since 1987 preservation of the Platte River ecosystem has been one of Audubon's highest priorities. Audubon is involved in a variety of activities on the Platte. For example, Audubon owns and manages a 1,200-acre sanctuary on the river near Gibbon, Nebraska for the benefit of the river's wildlife. Audubon scientists are engaged in research on the relationship between the physical environment and the plant and animal communities of the Platte River ecosystem. Since 1984 Audubon scientists and field staff have participated in the Platte River Management Joint Study, which is a cooperative effort between the Bureau of Reclamation and the U.S. Fish and Wildlife Service to devise a comprehensive management plan that would protect endangered species that depend on the Platte. Finally, in addition to this Supreme Court proceeding, Audubon is involved in several administrative proceedings before federal and state agencies to assure that the flow requirements for wildlife are protected.[3]

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[2]On March 23, 1987 Audubon moved to intervene to become a full party in this proceeding. The Special Master denied Audubon's motion, but allowed Audubon to participate as liticating amicus curiae to represent the fish and wildlife interests that may be affected by the Court's decision in this case. At the hearing that took place before the Special Master in Salt Lake City on June 7-8, 1991, the Special Master invited Audubon and the other amici present to pretition the Court for reconsideration of the intervention motions, if the amici desired. In response to the Special Master's invitation, Audubon filed a Petition for Reconsideration of Motion for Leave to Intervene on August 4, 1991, which is currently before the Special Master.

[3]Audubon is participating in the annual and permanent relicensing proceedings for the Kingsley Dam facilities, currently pending before the Federal Energy Regulatory Commission. In the Matter of Central Nebraska Public Power and Irrigation District, Project No. 1417, and In the Matter of Nebraska Public Power District, Project No. 1835. Audubon is also a party to state administrative proceedings before the Nebraska Department of Water Resources, involving applications for instream flow appropriations for fish and wildlife, and for rights to store and release water from Lake McConaughy for the benefit of downstream fish and wildlife. Applications Nos. A-17004

ARGUMENT

In her October 9 Brief in Support of Motion for Leave to File an Amended Petition, Nebraska has noted correctly that fish and wildlife benefit from and indeed depend upon unapportioned, non-irrigation season flows and the flow regime that exists currently in the Platte River in Nebraska.[4] This amicus brief is intended to inform the Court of the unique nature of the Platte River ecosystem, and the extent to which the features of the system are a result of the river's year-round flow regime. In addition, the brief will summarize the degradation that has occurred on the Platte due to decreases in historic flows, and the additional harm that would result from any further diminution of flows.

I.

Platte River Ecosystem is a Unique System of National and International Importance That is Dependent on Irrigation Season and Non-Irrigation Season Flows

The Platte River and its major tributaries comprise one of the most important migratory bird habitats in North America. The river historically offered, and in some stretches still offers, a unique combination of features inviting to migratory waterfowl, shore birds and wading birds. The Platte lies in the middle of the Central Flyway, and therefore is of critical importance to hundreds of species of birds during their Spring and Fall migrations. Approximately 250 species of migratory birds use the Platte to rest, nest and/or feed. As Nebraska has pointed out in her Brief in Support of Motion for Leave to File an Amended Petition, the fish and wildlife that depend on the flow regime of the river are dependent on flows in both the irrigation and non-irrigation seasons.[5]

The Platte River's historical and unique features resulted from wide fluctuations in flow during the year, including an annual low flow season in late summer and annual spring flooding when the river filled its banks. The floods carried large sediment loads and restructured the river's braided channels. Through the summer, as water flows declined, low unvegetated sandbars came to dominate more and more river channel. The sand-bottomed channel was surrounded by wet meadows -- a mix of grasslands inundated to a variety of water depths and for varying periods during the year.

The wide, shallow, braided prairie river allowed, and in certain places still allows, large numbers of wading birds to roost and shorebirds to nest in safety. Several stretches in the 53-mile long and three-mile wide "Big Bend" reach of the Platte from Lexington to Denman, Nebraska, retain the characteristics of the original braided river. The Big Bend reach included habitat that the U.S. Fish and Wildlife Service ("USFWS") has determined is critical to the continued existence of the endangered Whooping Crane.[6] The entire natural population of the Whooping Crane currently migrates through the Big Bend reach of the river

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through A-17009, and Applications Nos. A-2374 and A-17018.

[4]Nebraska Brief in Support of Motion for Leave to File an Amended Petition at 19 (October 9, 1991).

[5]Nebraska Brief in Support at 17.

[6]43 Fed. Reg. 20,938 (1978); 50 C.F. R 17.95 (1991).

between their wintering habitat in Aransas National Wildlife Refuge in Texas and their breeding grounds in northern Canada.[7]

In addition to the Whooping Crane, five other federally listed endangered or threatened species use the Platte below Tri-State Dam. These species are the American Bald Eagle, the Peregrine Falcon, the Interior Least Tern, the Eskimo Curley, and the Piping Plover.

The Platte River is also known for its large flocks of Sandhill Cranes, ducks, and geese that congregate on the river in the late winter and spring. More than eighty percent of the world's population of Sandhill Cranes stage annually on the Platte during their northward migration to their nesting grounds in the northern mid-continental states, Canada, Alaska, and Siberia -- the largest congregation of cranes in the world.[8] Seven to nine million ducks and geese use the area in the spring and again in the fall.[9] Approximately two-thirds of the mid-continental population of Greater White Fronted Geese stage in the Platte River valley and the

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[7]USFWS, "The Platte River Ecology Study," Special Report, Northern Prairie Wildlife Research Center (1981).

[8]USFWS, supra.

[9]Currier, P., G. Lingle, J. VanDerwalker, Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska, Platte River Whooping Crane Maintenance Trust at 43 (1985).

adjacent Rain Water Basins each spring.[10]

In addition to the critical habitat in the Big Bend reach that USFWS identified for the Whooping Crane, USFWS has designated two areas on the river in Nebraska "Resource Category 1" (unique and irreplaceable) habitat by the USFWS: 80 miles between Overton and Chapman on the mainstem of the Platte for Sandhill Cranes and Greater White-fronted Geese; and 20 miles between Sutherland and the town of North Platte on the North Platte for Sandhill Cranes.[11]

II.

The Platte River Ecosystem Has Been Degraded by Diminution in Flows, and Will Degrade Further if Wyoming Depletes Natural and Return Flows During the Non-Irrigation Season

Only a few reaches of the Platte and North Platte in Nebraska retain the characteristics of the original braided river. Changes in the river's flows, largely attributable to man-made irrigation and hydropower projects, have altered

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[10]USFWS, supra.; Safina, C., L. Rosenbluth, C. Pustweller, K. Strom, R. Klataske, M. Lee, and J. Beyea. Threats to Wildlife and the Platte River, National Audubon Society Environmental Analysts Department Report (1989); p. 26.

[11]"Resource Category 1" is a federal classification that recognizes significant habitat -- i.e., habitat that is unique and irreplaceable -- for non-endangered species. While not having legal significance comparable to "critical habitat" designated pursuant to section 4 of the Endangered Species Act, 16 U.S.C. 1533, the classification indicates that such habitat is unique to the nation or to the eco-region and irreplaceable, and its integrity should not be compromised.

the face of the river and reduced the quantity and quality of migratory bird habitat.

The entire river in Nebraska was once a braided stream, with a straight channel and non-cohesive banks.[12] Sandbars were transient features of the streambed. The shallow, wide character of the channel was sustained by a large sediment load and high peak discharges. Today, much of the river consists of multiple channels threading around permanent, vegetated islands. The transient river bars and islands that were once characteristic of the Platte have now stabilized. Cottonwoods and willow trees have become established over much of the former floodplain. Historic data and analyses of current conditions indicate that the river's habitat value is likely to continue to degrade, unless the flow regime on the river is adjusted.

The habitat that remains on the Platte is sustained by the river's natural flow and by return flows below the Tri-State Dam. If Wyoming is allowed to deplete the natural flow of the river or the return flows during either the irrigation or non-irrigation seasons, the habitat is likely to degrade even further.

If Nebraska's allegations in her Motion to Amend are correct, then even if the Special Master rules in her favor in the instant enforcement proceeding, which only encompasses irrigation season flows, the downstream equities would not be protected by the Court's decision. This is so because the projects at issue operate all year. If the Court enjoins Wyoming from depleting the irrigation season flows,

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[12]O'Brien, J.S. and P.J. Currier. "Channel Morphology and Riparian Vegetation Changes in the Big Bend Reach of the Platte River in Nebraska." Final Draft Report, Platte River Whooping Crane Critical Habitat Maintenance Trust (1987).

Wyoming could offset the loss of water available to her by increasing the quantity of water stored during the non-irrigation season. By doing so, Wyoming effectively could abrogate the protection for the downstream equities that would be provided by the injunction. Increased upstream storage would result in less water available for uses downstream in Nebraska during both the irrigation and non-irrigation seasons. The downstream equities in Nebraska, which depend on instream flows, would no doubt suffer.

As Nebraska has written in her Brief in Support, there is a hydrologic relationship between the flows of the irrigation and non-irrigation seasons.[13] There is also a relationship between water use upstream and instream flows downstream; the river throughout its course is a "single stream."[14] It is apparent today that a variety of equities in Nebraska, including wildlife, depend on residual instream flows, during both the irrigation and non-irrigation seasons. The flows year-round support the habitat upon which migratory species depend. In addition, certain species that are resident on the river all year, like the American Bald Eagle, require minimum flows. It would be appropriate for the Court to allocate the non-irrigation season flows in this proceeding, and in so doing to assure the fullest protection possible for the wildlife and other downstream equities.

CONCLUSION

For all of these reasons, Audubon supports

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[13]Nebraska Brief in Support at 21.

[14]Nebraska Brief in Support at 16, citing Wyoming v. Colorado, 259 U.S. 466 (1922).

Nebraska's Motion to Amend its Petition.

Respectfully submitted,

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